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In The

# Supreme Court of the United States

October Term, 1998

BOARD OF REGENTS OF THE STATE OF TENNESSEE, ET AL.,

*Petitioners,*

v.

DALVAN M. COGER, ET AL.,

*Respondents,*

and

UNITED STATES OF AMERICA,

*Intervenor Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution protects the States against suits in the federal courts by private persons alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Board of Regents of the State of Tennessee and The University of Memphis (formerly known as Memphis State University), respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. 1-25) is reported at 154 F.3d 296. The opinion of the United States District Court for the Western District of Tennessee (App. 26-41) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1998. No rehearing was sought. By order filed September 10, 1998, the Court of Appeals stayed the mandate pending the filing of this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> Section 1. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, are reproduced in the Appendix (App. 42-46).

## STATEMENT OF THE CASE

Respondents are 17 faculty members employed by Memphis State University (now known as The University of Memphis). They filed this action in 1989 in the United States District Court for the Western District of Tennessee, alleging that they are the victims of individual disparate treatment, disparate impact and pattern or practice discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, ("ADEA") and 42 U.S.C. § 1983. Among other things, respondents

claimed that the University changed its mission to emphasize research over teaching and used its faculty evaluation and salary increase programs to reinforce this change. Respondents charged that these programs discriminated against faculty approaching or beyond the age of 50, because the programs allegedly favored research and scholarly activity, engaged in by more of the younger faculty, over time spent teaching. Respondents each sought back pay, salary and pension adjustments, and compensatory damages, as well as declaratory and injunctive relief. Named as defendants were the Board of Regents of the State of Tennessee, an instrumentality of the state charged with the duty to govern, manage and control Tennessee's state university and community college system;[1] Memphis State University (now The University of Memphis), respondents' employer and one of the institutions under the jurisdiction of the Board;[2] Thomas G. Carpenter, President of the University; and Victor E. Feisal, the University's Vice-President of Academic Affairs.

After respondents presented their case-in-chief at trial, petitioners moved in June 1994 for judgment on partial findings under Fed.R.Civ.P. 52(c). By order entered May 24, 1996, the district court granted the motion as to eight of the respondents' claims of individual disparate treatment and denied the motion as to all other claims. During the pendency of petitioners' Rule 52 motion, this Court handed down its decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). In September 1996, based upon

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[1] Tenn. Code Ann. § 49-8-101(b) (1996).

[2] Tenn. Code Ann. § 49-8-101(a) (1996).

*Seminole Tribe*, petitioners moved to dismiss the case for lack of subject matter jurisdiction, asserting that the Eleventh Amendment immunized the states from suit in federal court by private persons under the ADEA.

By order entered January 2, 1997, the district court dismissed the case in its entirety, holding that the Eleventh Amendment barred respondents' ADEA claims and, accordingly, that the court lacked subject matter jurisdiction. (App. 40-41).[3] Applying the first prong of the two part test enunciated in *Seminole Tribe* and prior cases for determining whether the states enjoy Eleventh Amendment immunity from suit under a federal statute, the district court concluded that Congress had not "unequivocally and textually" expressed an intent to waive the

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[3] The district court earlier entered summary judgment in favor of defendant Feisal on the sole claim against him, an individual capacity claim under 42 U.S.C. § 1983, on grounds of qualified immunity. The court reasoned that "there is no question that propelling a state university into a position as one of the top 100 research institutions is a legitimate state interest" and that respondents had not alleged that any of Feisal's adverse employment actions were not rationally related to this and other legitimate purposes. Docket Entry #137, at 6-7 (February 14, 1994). In its January 1997 order sustaining petitioners' assertion of Eleventh Amendment immunity and dismissing the case in its entirety, the district court also disposed of all remaining claims against defendant Carpenter. (App. 28). Noting that respondents were seeking only prospective injunctive relief against defendant Carpenter, the district court ruled that such relief is no longer available because Carpenter has left the University's employment and, accordingly, "is no longer a state officer involved in any alleged ongoing violation of federal law." *Id.* Respondents have not challenged either ruling on appeal.

states' immunity in the ADEA. (App. 34-35). The district court noted that, "[a]s originally enacted, the ADEA applied neither to the federal government nor to the states or their political subdivisions" but that, "[i]n 1974, Congress extended the substantive prohibitions of the Act to the federal and state governments by amending the definition of 'employer' and 'employee.' " 29 U.S.C. § 630(b) and (f). (App. 29). Under the district court's reading of *Seminole Tribe* and prior decisions applying the so-called "clear statement rule," however, the 1974 definitional amendments, by themselves, were deemed insufficient evidence of congressional intent to abrogate the states' immunity: "Congress makes no reference in any provisions of the ADEA, or its amendments, to the states' immunity from federal court lawsuits, nor does any inference of waiver exist." (App. 34).

The district court alternatively determined that, under *Seminole Tribe*'s second prong, the ADEA also failed to accomplish an effective waiver of the states' Eleventh Amendment immunity, because "the 1974 amendments [expanding the ADEA's coverage to the states] were passed pursuant to Congress' Commerce Clause powers," rather than to enforce the provisions of the Fourteenth Amendment. (App. 35). In support of its conclusion in this regard, the district court noted that four members of this Court had concluded "that the ADEA amendments were not and could not have been enacted under the authority of the Fourteenth Amendment." (App. 37, *citing E.E.O.C. v. Wyoming*, 460 U.S. 226, 259-63 (1983) (Burger, C.J., joined by Powell, Rehnquist and O'Connor, JJ., dissenting)). In addition, the district court relied upon the legislative history of the 1974

amendments to the ADEA, during which Congress expressly invoked "its powers to regulate commerce among the several States and with foreign nations" as the basis for its actions without mentioning the Fourteenth Amendment. (App. 39 n.9-40, *citing* H.R. Report No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811-12).

A panel of the court of appeals reversed and remanded the case to the district court for a continuation of the trial of respondents' ADEA claims. On the question whether Congress had expressed an "unmistakably clear" intent within the text of the ADEA to abrogate the states' Eleventh Amendment immunity, the panel opined that the 1974 amendments expanding the definition of "employer" to include the states amounted to "an unmistakable statement that states are *not* immune from ADEA suits." (App. 9 (emphasis in original)). Referring to the enforcement provisions of the ADEA – 29 U.S.C. § 626(b) and (c) – the panel reasoned that "[w]hen Congress added the states to the definition of 'employer,' it did so knowing that the ADEA provides that an employer who violates the statute is liable for legal and equitable relief." (App. 9-10). The panel failed to note, however, that the word "employer" nowhere appears in either § 626(b) or § 626(c) of the Act.

The court of appeals also disagreed with the district court's conclusion that the ADEA failed the second prong of the *Seminole Tribe* test. First, according to the panel, it was immaterial that Congress did not expressly invoke Section 5 of the Fourteenth Amendment as the source of its legislative authority either when it originally enacted

the ADEA in 1967 or in connection with the 1974 amendments. (App. 17). Nor, in the panel's view, should Congress's express invocation of the Commerce Clause when passing the 1974 amendments affect the analysis. *Id.* Instead, the panel focused on the legislative history surrounding the original enactment of the ADEA and concluded that Congress's principal concern was to eliminate "the injustice of discrimination based on age," a purpose also evidently underlying the passage of the 1974 amendments. *Id.* Since the ADEA is " 'plainly adapted' to enforcing the Equal Protection Clause and 'not prohibited by . . . the letter and spirit of the [C]onstitution,' " the panel reasoned, it necessarily qualifies as "appropriate legislation" under Section 5 of the Fourteenth Amendment, regardless whether Congress expressly so stated. (App. 15).

The court of appeals also rejected petitioners' contention that the ADEA fails to qualify as an "appropriate" remedial exercise of Congress's Section 5 enforcement powers under *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), decided after the district court's dismissal of respondents' ADEA claims. The congressional purpose in enacting the ADEA and the 1974 amendments was to eliminate "the practice of using age classifications in employment in both the private and public sector." (App. 23). That practice violates the Constitution, according to the panel, "because such classifications are arbitrary and discriminatory." *Id.* "[B]y requiring that employer determinations be based on merit," *id.*, the ADEA represented a proportionate response "to the scope of the threatened constitutional violations" in the panel's view. (App. 24). Although conceding that "the ADEA may prohibit some

conduct not prohibited by the Constitution," the panel nevertheless concluded that "the [1974] amendments to the ADEA do not create substantive rights" under the Fourteenth Amendment in violation of *City of Boerne* "but, instead, are remedial in nature . . . " *Id.* The panel did not discuss whether the legislative history of the 1974 amendments disclosed the extent to which, if any, the states had engaged or were engaging in unconstitutional "arbitrary age discrimination in employment" (29 U.S.C. § 621(b)) requiring an exercise of Congress's Section 5 remedial powers.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER THE ELEVENTH AMENDMENT PROTECTS THE STATES AGAINST SUITS IN FEDERAL COURT BY PRIVATE PERSONS ALLEGING VIOLATIONS OF THE ADEA.

This case squarely presents a constitutional issue of substantial importance to the States on which the courts of appeals are now in direct conflict: whether the States enjoy Eleventh Amendment immunity from suits brought in federal court by citizens claiming discrimination in violation of the ADEA. Petitioners are, respectively, a state-owned university and the arm of Tennessee's government charged by state law with the duty to manage and control that university. Thus, there can be no question that this action is one against the State of Tennessee

and that both petitioners are eligible to claim the protections of the Eleventh Amendment. Nor have respondents argued at any stage of these proceedings that either of these petitioners, or the State of Tennessee, has consented to suit in federal court in actions brought under the ADEA or has otherwise waived immunity.

The decision below overruling petitioners' claim of immunity conflicts with the decisions of two other circuits. Federal courts ask two questions when adjudicating any claim of state sovereign immunity: "first, whether Congress has 'unequivocally express[ed] its intent to abrogate immunity, . . . and second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996), *quoting Green v. Mansour*, 474 U.S. 64, 68 (1985). Holding that the states may not be sued in federal court by private citizens for ADEA violations, the Court of Appeals for the Eighth Circuit has answered both questions in the negative. *Humenansky v. Regents of the University of Minn.*, 152 F.3d 822 (8th Cir. 1998). In *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), the Court of Appeals for the Eleventh Circuit also found Eleventh Amendment immunity against state employee claims under the ADEA, although the two judges comprising the panel majority on this issue in *Kimel* employed different rationales to support their conclusions.[4]

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[4] Judge Edmondson, in his opinion announcing the judgment of the *Kimel* court, sustained the state's defense of Eleventh Amendment immunity on the ground that "nothing in the ADEA indicates a truly clear intent by Congress to abrogate . . . [the] immunity." *Kimel*, 139 F.3d at 1433. On the other hand, Judge Cox, concurring in the judgment of the court

By contrast, the majority of the circuits have sided with the view expressed by the Sixth Circuit in this case. *See Migneault v. Peck*, ___ F.3d ___, 1998 WL 741545 (10th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 498-503 (5th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Goshtasby v. Board of Trustees of the University of Ill.*, 141 F.3d 761 (7th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983). *See also Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694-95 (3d Cir. 1996) (dictum); *Santiago v. N.Y. State Dep't of Correctional Services*, 945 F.2d 25, 31 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (dictum); *Arritt v. Grisell*, 567 F.2d 1267, 1270 (4th Cir. 1977) (There is no Tenth Amendment immunity against ADEA claims because the statute was enacted pursuant to Congress's powers under Section 5 of the Fourteenth Amendment).

This Court should grant review in this case in order to resolve the conflict reflected in these decisions. The question whether the Eleventh Amendment protects the states from suit under the ADEA has now been directly addressed in eight of the eleven circuits within the boundaries of which state governments are located. And it has been the subject of indirect commentary and dicta in the other three circuits. Further development of the analysis by the lower courts – of the sort that might

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on this issue, concluded that, although the ADEA contains an adequate expression of congressional intent to abrogate, the statute is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. *Id.* at 1445-48.

materially inform this Court's ultimate resolution of the conflict – therefore seems unlikely.

Furthermore, the need for uniformity in the rules governing the relationship between the states and the federal government strongly supports using this case as the vehicle to settle the issue now, rather than at some later date. As the four dissenting Justices in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), correctly recognized, Congress's 1974 decision to subject the states to the ADEA's detailed standards regulating the selection and management of their employees represented a serious intrusion upon a core attribute of state sovereignty – "the ability of the state to structure integral operations." 460 U.S. at 255 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, J.J., dissenting). The degree of that intrusion is significantly intensified whenever a State is forced into a federal forum to defend against employee claims that these standards have been violated. As matters now stand, however, the states located within two of the federal circuits are wholly immunized from such claims, while all others remain vulnerable. Whichever represents the correct view of the law – whether the position adopted by the Sixth Circuit in this case or that espoused by the Eighth and Eleventh Circuits in *Humenansky* and *Kimel*, respectively – the same rule should govern all States. Only a decision by this Court can accomplish that objective.

## II. REVIEW IS ALSO NECESSARY TO CORRECT THE LOWER COURT'S MISAPPREHENSION OF THIS COURT'S DECISIONS ESTABLISHING WHAT CONSTITUTES AN ADEQUATE EXPRESSION OF CONGRESSIONAL INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The opinion of the court of appeals is contrary to this Court's decisions requiring an "unequivocal and textual" expression of congressional intent to abrogate the States' Eleventh Amendment immunity. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). The court below purported to find the requisite statement of Congress's intent to abrogate based solely upon the 1974 amendments to the ADEA, which expanded the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State" and the definition of "employee" to include "employees subject to the civil service laws of a State government." 29 U.S.C. § 630(b), (f). "When Congress added the states to the definition of 'employer'," the panel reasoned, "it did so knowing that the ADEA provides that an employer who violates the statute is liable for legal and equitable relief" under the enforcement provisions of the ADEA, 29 U.S.C. § 626(b) and (c). (App. 9-10).

But the expanded definitions of "employer" and "employee," even when read together with the enforcement provisions of the ADEA, "fall far short" of the standard of clarity demanded by this Court's prior case law. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). The basic flaw in the reasoning of the court below on this point is that the word "employer" nowhere

appears in the enforcement provisions of the ADEA, 29 U.S.C. § 626(b) and (c). The right of a private person to bring a civil action for redress under the ADEA is created by § 626(c)(1): "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . " The language of the statute thus does not identify who may be the target of such an action. Given the subject matter of the statute – the protection of employees from age discrimination at the hands of employers – the court below naturally and reasonably inferred that most defendants in § 626(c) actions will in fact be "employers." "But such a permissible inference, whatever its logical force, would remain just that: a permissible inference." *Dellmuth*, 491 U.S. at 232. It does not qualify as "the unequivocal declaration which . . . is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation." *Id.*

Indeed, § 626(c) of the ADEA would still fall short of the clarity required by this Court's prior decisions, even if it expressly authorized suit against an "employer." That is the teaching of *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973). In *Employees*, as here, the definition of "employer" contained in the federal statute in question originally excluded the states, but the statute was later amended to cover certain state hospitals and related institutions. In contrast to the ADEA, however, the scheme at issue in *Employees* expressly rendered an "employer" liable to an employee for violations of the statute and authorized actions "to recover *such* liability" in courts of competent jurisdiction. 411 U.S. at

283 (emphasis supplied). While, based on these provisions, this Court harbored "no doubt that Congress desired to bring under the Act employees of hospitals and related institutions" of the States, the Court held that the statutory scheme was insufficiently explicit to "lift the sovereign immunity of the States . . . " 411 U.S. at 285. *See also Atascadero State Hosp.*, 473 U.S. at 242-47 (provisions of Rehabilitation Act of 1973 authorizing suit against "any recipient of Federal assistance," coupled with implementing regulations expressly defining class of recipients to include the States, constitute insufficient expression of intent to abrogate).

Nor does the immediately preceding subsection of the ADEA – § 626(b) – supply the unequivocal expression of intent to abrogate plainly lacking in § 626(c). In the first place, § 626(b) is not the source of any private right of action under the Act; that right is created by § 626(c). Instead, § 626(b) describes the measure of damages and other remedies that are available, and the procedures that will govern, in actions to enforce the provisions of the ADEA, *i.e.*, actions brought under § 626(c). Moreover, like § 626(c), § 626(b) simply does not specify who may be a party defendant in an action brought to enforce the ADEA. The word "employer" does not appear in § 626(b). And, while it is certainly reasonable to infer from the nature of the remedies authorized in § 626(b) (*e.g.*, "judgments compelling employment, reinstatement or promotion") that the most likely targets of such actions will be "employers," such an inference, "whatever its logical force," is no substitute for the "unequivocal declaration"

demanded by this Court's precedents.[5] *Dellmuth*, 491 U.S. at 232.

Missing from the ADEA as well are "numerous references to the 'States' " of the kind and character that persuaded this Court to find an intent to abrogate in the Indian Gaming Regulatory Act, considered in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 (1996). The very subject matter of the statute analyzed in *Seminole Tribe* is the formation of tribal-*state* compacts governing Indian gaming; the enforcement provisions of the statute expressly specify certain burdens of proof to be borne by the *States* in actions brought to enforce the statute; and the statute specifically describes the circumstances under

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[5] The United States argued below that the reference in § 626(b) to § 216(b) of the Fair Labor Standards Act of 1938 ("FLSA") supplies the clear statement of Congress's intent to abrogate that is missing from § 626(b) itself. But surely a mere reference in one statute to a provision in another cannot qualify as an unmistakable expression in the text of the former of a congressional desire to alter "the fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hosp.*, 473 U.S. at 238. Congress should not be presumed to have taken such a serious step by dropping "coy hints" of its intention. *Dellmuth*, 491 U.S. at 231. Section 216(b) of the FLSA authorizes actions "against any employer (including a public agency) in any Federal or State court of competent jurisdiction" and the term "public agency" is defined elsewhere in the FLSA to include state employers. But the language of § 216(b) authorizes such actions only "to recover the liability prescribed in either of the two preceding sentences" of the subsection. The "two preceding sentences" create employer liability for violations of the minimum wage and hour and retaliatory discharge provisions of the FLSA, *not* for violations of any provision of the ADEA.

which the court may order *"the State"* to submit to mediation. 517 U.S. at 49-50, 56-7. Under the provisions of the ADEA, by contrast, the only reference to the States appears in the definitional section, and, as previously noted, the operative word therein defined – "employer" – does not appear in the provision of the statute creating a private enforcement action, 29 U.S.C. § 626(c)(1).

In summary, the conclusion of the court of appeals that Congress has adequately expressed an intent to abrogate in the text of the ADEA represents a glaring departure from this Court's prior decisions on the subject. In its rush to find the necessary expression of intent to abrogate in the provisions of the ADEA, the lower court has failed to exhibit "due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." *Dellmuth*, 491 U.S. at 227.

## III. THIS CASE ALSO PRESENTS AN APPROPRIATE OCCASION TO SETTLE THE QUESTION EXPRESSLY RESERVED IN *E.E.O.C. v. WYOMING* CONCERNING WHETHER THE ADEA WAS ENACTED BY CONGRESS IN THE VALID EXERCISE OF ITS POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

A finding that Congress has clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the text of a statute does not end the inquiry. Effective abrogation requires, in addition, that Congress act pursuant to a valid exercise of its constitutional power. Here, the court of appeals held that Congress extended the ADEA to cover the States in the valid exercise of its powers under Section 5 of the Fourteenth

Amendment, the sole remaining source of constitutional authority to abrogate Eleventh Amendment immunity after this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). This case, accordingly, presents the question expressly reserved by this Court fifteen years ago in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), namely, whether the ADEA as applied to the States is a proper exercise of Congress's Section 5 power "to enforce" by "appropriate legislation" the constitutional guarantee of "equal protection of the laws."

This Court should grant certiorari in order to settle that question and should adopt as the law of the land the view expressed by the four dissenting Justices in *Wyoming* that the 1974 ADEA amendments cannot qualify as valid Section 5 enforcement legislation. Petitioners submit that it is impossible to reconcile the analysis of the court of appeals on this point with this Court's most recent explication of the limits of Congress's Section 5 powers in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Contrary to the decision below, it is simply not enough to validate a purported exercise of Congress's Fourteenth Amendment enforcement powers that the legislation in question may be said "to effectuate the goals of the amendment." (App. 15). Rather, "Congress may act only where a violation lurks." *Wyoming*, 460 U.S. at 260 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting). Congress's Section 5 powers are thus limited to the arena of "measures that remedy or prevent unconstitutional actions." *City of Boerne*, 117 S.Ct. at 2164. Moreover, valid Section 5 legislation demands "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*

While the opinion of the court of appeals pays lip service to these principles, it wholly fails to apply them in a meaningful way to the 1974 amendments extending the prohibitions of the ADEA to the States. This Court's decisions defining the constitutional safeguards afforded by the Equal Protection Clause as they relate to classifications based on age leave the states free to make distinctions on that basis so long as the distinctions involved are rationally related to furthering a legitimate state interest. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Gregory v. Ashcroft*, 501 U.S. 452, 470-72 (1991). Thus, the only form of age discrimination forbidden to state employers by the Equal Protection Clause is that which is wholly irrational. Yet the opinion below fails even to ask whether Congress had before it in 1974 any evidence that state employers were threatening to engage in wholly irrational age discrimination in the workplace or had engaged in a pattern of such conduct in the past. Without such information concerning the extent of any past or threatened unconstitutional conduct by the States, petitioners submit that the court of appeals could not possibly have assessed, as required by *City of Boerne*, the degree of "congruence and proportionality between the injury to be prevented or remedied and the means adopted [in the ADEA] to that end." 117 S.Ct. at 2164.

The prohibitions of the ADEA sweep far more broadly than a mere ban against irrational age discrimination in the workplace and, accordingly, reflect a complete "lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *City of Boerne*, 117 S.Ct. at 2171. The invocation of the ADEA's protections by the faculty respondents in this

case graphically illustrates the point. Petitioners' ADEA violation is claimed to arise from their adoption of performance evaluation and salary adjustment policies that reward research and scholarly activity over teaching and thereby adversely affect respondents' employment status on account of their age. Those allegations do not even remotely make out a constitutional violation, however. No one would argue that a State may not legitimately choose to strengthen the research capacity and reputation for scholarship of one of its large public universities or that it acts irrationally by adopting faculty compensation and promotion policies designed to further that goal.

Thus, as this case amply demonstrates, the States may be hailed into federal court to defend against ADEA challenge a wide range of state employment practices that entirely comport with the requirements of equal protection. And, as the opinion below reveals, Congress has imposed that burden upon the States without evidence of past or threatened constitutional violations by state employers that require remediation or prevention. Congress's Section 5 power is "the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 117 S.Ct. at 2164. It is "corrective or preventative, not definitional." *Id.* at 2166. The ADEA, as applied to the States, exceeds those powers.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX**

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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|---|---|---|
| DALVAN M. COGER; JOSEPH K. DAVIS; CAROLYN THORPE FURR; LUCILLE GOLIGHTLY; THOMAS M. HUGHES; JANIE S. KNIGHT; CHARLES E. LONG, JR.; HARRY RICHARD MAHOOD; RAMONA MADSON MAHOOD; ROBERT MARSHALL; BETTY HULL OWEN; JUNE ROSE RICHIE; STEVE SCESA; CHARLES R. SCHROEDER; ROBERT A. SNYDER; BOB J. TUCKER; SHARON L. VAN OTEGHEN, *Plaintiffs-Appellants,* | ) | No. 97-5134 |
| WILLIAM WELCH, *Plaintiff,* | ) | |
| UNITED STATES OF AMERICA, *Intervenor,* | ) | |
| *v.* | ) | |
| BOARD OF REGENTS OF THE STATE OF TENNESSEE, A Subdivision of the State of Tennessee; MEMPHIS STATE UNIVERSITY, An Institution operated by the State Board of Regents; THOMAS G. CARPENTER, Individually and as President of Memphis State University; VICTOR E. FEISAL, Individually and as Vice-President of Academic Affairs at Memphis State University, *Defendants-Appellees.* | ) | |

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 89-02374 – Julia S. Gibbons, Chief District Judge.

Argued: April 30, 1998
Decided and Filed: August 17, 1998
Before: JONES, MOORE, and COLE, Circuit Judges.

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**COUNSEL**

**ARGUED:** Donald A. Donati, DONATI & ASSOCIATES, Memphis, Tennessee, for Appellants. Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellees. Seth M. Galanter, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor. Jeffrey S. Sutton, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Amicus Curiae. **ON BRIEF:** Jeffery L. Atchley, Donald A. Donati, DONATI & ASSOCIATES, Memphis, Tennessee, for Appellants. Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, Sheryl H. Lipman, BURCH, PORTER & JOHNSON, Memphis, Tennessee, for Appellees. Seth M. Galanter, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor. Douglas A. Hedin, LAW OFFICE OF DOUGLAS A. HEDIN, Minneapolis, Minnesota, Thomas W. Osborne, AMERICAN ASSOCIATION OF RETIRED PERSONS, Washington, D.C., Jeffrey S. Sutton, Jack W. Decker, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Amici Curiae.

## OPINION

R. GUY COLE, JR., Circuit Judge. This appeal presents a single issue: are states immune from suits brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, on the basis of Eleventh Amendment immunity? This issue requires us to consider, in light of the Supreme Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the following two questions: (1) whether Congress expressed its intent to abrogate the states' Eleventh Amendment immunity in ADEA actions; and, if so, (2) whether Congress acted pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment.

Upon consideration of this case, the district court determined that the ADEA did not abrogate the states' Eleventh Amendment immunity and, accordingly, dismissed the ADEA suit at issue on the basis of that immunity. We disagree with the district court and conclude that: (1) Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity in ADEA suits; and, in so doing, (2) Congress acted pursuant to a valid exercise of its Section 5 authority to enforce the Equal Protection Clause of the Fourteenth Amendment. Because the district court erred in dismissing the underlying cause, we REVERSE and REMAND for further proceedings in accordance with this opinion.

## I.

This ADEA action was brought in 1989 by seventeen senior faculty members of Memphis State University (now known as the University of Memphis) who were employed in ten different departments of the university. The plaintiffs ("Faculty Members") asserted claims of individual disparate treatment, as well as claims of disparate impact and pattern or practice discrimination in violation of the ADEA. The Faculty Members specifically challenged the university's salary increase and faculty evaluation program as being used discriminatorily against older faculty.

After discovery by both sides, the district court conducted a bench trial beginning in December of 1993, which took place sporadically over the course of the next five months. Upon the conclusion of the Faculty Members' proof in May 1994, the defendants (collectively, "the University") filed motions in June of 1994 pursuant to Fed.R.Civ.P. 52(c) for judgment on partial findings.[1] On May 24, 1996, the district court entered an order denying in part and granting in part the motion for partial findings. The district court granted the motion as to eight of

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[1] Fed.R.Civ.P. 52(c) provides: "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

the Faculty Members on their individual disparate treatment claims and denied the motion as to all other claims.

At about this time in the proceedings, in March 1996, the Supreme Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in which it addressed the issue of the states' Eleventh Amendment immunity from suit. In September of 1996, the University filed a motion to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(1) (lack of subject matter jurisdiction) and Fed.R.Civ.P. 12(b)(6) (failure to state a claim for which relief may be granted) based on its claim of Eleventh Amendment immunity from suit. On January 2, 1997, without continuing the trial to hear the University's proof, the district court entered an order dismissing the ADEA action in its entirety on the basis that the State of Tennessee enjoyed Eleventh Amendment immunity against ADEA actions.

The Faculty Members then filed a timely notice of appeal.

## II.

We review de novo a district court's dismissal of a suit for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996), *cert. denied*, 117 S.Ct. 2409 (1997). We must construe the complaint in the light most favorable to the plaintiff, accept the complaint's factual allegations as true, and determine whether it is beyond a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Id.*

In addition, we review de novo a district court's dismissal of a case pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir.1996).

## III.

### A. The Eleventh Amendment and *Seminole Tribe*

Through its provision of sovereign immunity, the Eleventh Amendment to the United States Constitution denies the federal courts jurisdiction to entertain a suit brought by an individual against a state. *See Seminole Tribe*, 517 U.S. at 54; *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. However, there are exceptions to the states' sovereign immunity. Congress may abrogate the states' Eleventh Amendment sovereign immunity pursuant to Section 5 of the Fourteenth Amendment,[2] which provides Congress with the power to enforce the

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[2] Section 5 of the Fourteenth Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Fourteenth Amendment. *Id.* at 1123. Among the provisions of the Fourteenth Amendment is the Equal Protection Clause.[3] *See* U.S. Const. amend. XIV, § 1.

In *Seminole Tribe*, the Supreme Court established a two-part inquiry for determining whether Congress abrogated the states' sovereign immunity when enacting a particular statute. *See* 517 U.S. at 55, 72-73. The Court held that, absent a state's waiver, states retain their sovereign immunity unless: (1) Congress unequivocally expressed its intent to abrogate the immunity; and (2) Congress acted pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment. *Id.; see also Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 837, 838 (6th Cir.1997).

In order to satisfy the first *Seminole Tribe* requirement, Congress must make its intent to abrogate the states' immunity "unmistakably clear." *Seminole Tribe*, 517 U.S. at 56 (quotation and citation omitted). To satisfy the second

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[3] Section 1 of the Fourteenth Amendment includes the Equal Protection Clause and provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. Const. amend. XIV, § 1 (emphasis added).

requirement, Congress must act "pursuant to a constitutional provision granting Congress the power to abrogate." *Id.* at 59. Because Section 5 of the Fourteenth Amendment is the only constitutional provision recognized by the Supreme Court as granting Congress the power to abrogate the states' immunity, *id.* at 66, 72-73, the second *Seminole Tribe* requirement necessitates that we determine whether Congress had the authority pursuant to Section 5 of the Fourteenth Amendment to abrogate the states' sovereign immunity in ADEA actions.

**B. Intent to Abrogate**

We must first decide whether Congress made its intent to abrogate the states' immunity "unmistakably clear," *Seminole Tribe*, 517 U.S. at 56 (quotation and citation omitted), when it enacted the 1974 amendments to the ADEA, which extended the ADEA's applicability to the states. *See* Fair Labor Standards Act Amendments of 1974, § 28, 88 Stat. 74. The University argues that, as the district court found, the language of the ADEA does not make Congress's intent to abrogate the states' immunity unmistakably clear, as required by the Supreme Court. The University contends that the ADEA's definition of "employer," which includes states and thus makes it possible for states to be liable as employers of ADEA plaintiffs, falls short of evincing an unmistakably clear intent to abrogate the states' immunity. The University points out that the Court has required that a statement of Congress's intent must be made with "perfect confidence." *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). It contends that the simple expansion of the definitions of "employer"

and "employee" in the statute is insufficient to establish congressional intent to abrogate the states' immunity.

The Faculty Members argue that the statute's definition of "employer" sufficiently indicates Congress's intent to abrogate the states' immunity because that definition expressly includes the states. In their view, states are not immune from ADEA liability because they are specifically listed in the statute as parties subject to liability.

We agree with the reasoning of the Faculty Members. Congress's decision to make states liable under the ADEA is an unmistakable statement that states are *not* immune from ADEA suits. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). When Congress enacted the ADEA in 1967, the statute applied only to private employers. *See EEOC v. Elrod*, 674 F.2d 601, 605-06 (7th Cir.1982). In 1974, Congress amended the statute so that it also applied to the states by expanding the definition of "employer" to encompass "a State or political subdivision of a State and any agency or instrumentality of a State," Fair Labor Standards Act Amendments of 1974, § 28(a)(2), 88 Stat. 74 (amending 29 U.S.C. § 630(b)(2)), and by amending the term "employee" to include "employees subject to the civil service laws of a State government," *id.* § 28(a)(4) (amending 29 U.S.C. § 630(f)). When Congress added the states to the definition of "employer," it did so knowing that the ADEA provides that an employer who violates the statute is

liable for legal and equitable relief. *See* 29 U.S.C. § 626(b), (c).

In reaching our conclusion, we take guidance from the Supreme Court's treatment of this issue in the context of other statutory schemes. In *Seminole Tribe*, the Supreme Court regarded the vesting of jurisdiction in the federal courts for causes of action arising from a state's failure to negotiate with an Indian tribe, *see* 25 U.S.C. § 2710(d)(7)(a)(i), as sufficiently indicative of Congress's intent to abrogate the states' immunity against suit in the federal courts.

> Congress has in § 2710(d)(7) provided an unmistakably clear statement of its intent to abrogate. Section 2710(d)(7)(A)(i) vests jurisdiction in the United States district courts over any cause of action arising from the failure of a State to enter into negotiations in good faith. Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe who files suit. . . . In sum, we think that the numerous references to the "State" in the text *make it indubitable* that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

*Seminole Tribe*, 517 U.S. at 57 (quotations, ellipses and brackets omitted, emphasis added). In *Pennsylvania v. Union Gas Co.*, the Supreme Court held that Congress unequivocally waived the states' immunity under

CERCLA.[4] 491 U.S. 1 (1989), *overruled on other grounds, Seminole Tribe*, 517 U.S. at 65. The Court pointed to the fact that under CERCLA's liability scheme, "persons" who own or operate hazardous waste facilities or who transport or dispose of hazardous waste are liable for removal and remediation costs, *see* 42 U.S.C. § 9607(a), and that CERCLA defines "persons" to include states. *See Union Gas*, 491 U.S. at 8. In addition, the Court noted that CERCLA provides that in almost all circumstances, states are to be treated in the same manner as non-governmental owner-operators. *See* 42 U.S.C. § 9601(2)(D).

We hold that Congress made its intent to abrogate the states' immunity against ADEA suits eminently clear. "Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases – and that degree of explicitness is not required . . . – it could not have made its desire to override the states' sovereign immunity clearer." *Davidson v. Board of Governors of State Colleges and Univs.*, 920 F.2d 441, 443 (7th Cir.1990) (citations omitted); *see also Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir.1997) (reaffirming its holding that Congress abrogated the states' Eleventh Amendment immunity in enacting the ADEA's 1974 amendments); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir.1983) ("[T]he ADEA's express authorization for the maintenance of suits against

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[4] The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. 99-499, 100 Stat. 1613.

state employers comprises adequate evidence to demonstrate the congressional will that Eleventh Amendment immunity be abrogated.").

In reaching this conclusion, we join other appellate courts which have addressed this issue since the *Seminole Tribe* decision and have also determined that the definitional and enforcement provisions of the ADEA contain the necessary clear statement of Congress's intent to abrogate state sovereign immunity. *See Scott v. University of Mississippi*, ___ F.3d ___, 1998 WL 422655 (5th Cir. July 27, 1998); *Keeton v. University of Nevada Sys.*, ___ F.3d ___, 1998 WL 381432 (9th Cir. July 10, 1998); *Gustasby v. Board of Trustees*, 141 F.3d 761, 765-76 (7th Cir.1998); *Hurd*, 109 F.3d at 1544. *But see Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426, 1432 (11th Cir.1998) (holding that ADEA lacks unequivocal expression of an intent to abrogate states' immunity, but reaching such conclusion after limiting consideration to only the actual language of the statute itself).

### C. Power to Abrogate

Having determined that Congress intended to abrogate the states' Eleventh Amendment immunity in extending ADEA coverage to the states, we must now determine whether Congress enacted the ADEA amendments pursuant to a valid exercise of its enforcement authority under Section 5 of the Fourteenth Amendment. *See Seminole Tribe*, 517 U.S. at 59. The University argues that: (1) Congress did not *intentionally* enact the 1974 amendments to the ADEA pursuant to its enforcement power under Section 5 of the Fourteenth Amendment;

and, even if Congress had intentionally done so, (2) the 1974 amendments to the ADEA were not a valid exercise of that power.

1.

In making its first argument, the University asserts that *Seminole Tribe* changed the analysis by which we determine the constitutional authority for the enactment of a statute. According to the University, after *Seminole Tribe*, the appropriate question is whether Congress *in fact* enacted a statute pursuant to its Section 5 power, not whether Congress *could have* enacted the statute pursuant to its Section 5 power. The University thus argues that the 1974 amendments to the ADEA were in fact enacted pursuant to the Commerce Clause and not Section 5 of the Fourteenth Amendment because the legislative history of the ADEA amendments refers to the Commerce Clause.

a.

We disagree with the University's position that *Seminole Tribe* altered the analysis we use to determine a statute's constitutional authority. Even after *Seminole Tribe*, the question we must answer is whether Congress actually possessed the authority to adopt the legislation, not whether Congress correctly articulated the source of that authority. *See Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir.1998). As we stated in *Timmer*, "*Seminole Tribe* says nothing about the situation presented here where there is a question about whether Congress

legislated pursuant to an unstated Constitutional provision." 104 F.3d at 841-42. As long as Congress possesses the authority, whether it also has the specific intent to legislate pursuant to that authority is irrelevant. *Doe v. University of Illinois*, 138 F.3d 653, 658-59 (7th Cir.1998) (considering Eleventh Amendment immunity issue with regard to ADA); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir.1997) (considering Eleventh Amendment immunity in relation to Title IX); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir.1996) (stating that "[a] source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on that particular source of power"). "It is not necessary for Congress to expressly rely on § 5 in exercising its power because such power clearly existed. . . . [W]e are concerned with the actual powers of the national government." *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116, 120 (6th Cir.1978) (citation and quotation omitted); *see also Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir.1977) ("Our duty in passing on the constitutionality of legislation is to determine whether Congress had the authority to adopt legislation, not whether it correctly guessed the source of that power.").

Other circuits which have addressed the argument presented by the University have uniformly concluded that *Seminole Tribe* did not change the standard for determining whether legislation was enacted pursuant to Congress's Section 5 power. *See, e.g., Goshtasby*, 141 F.3d at 768; *CSX Transp., Inc. v. Board of Public Works of W. Va.*, 138 F.3d 537, 539-40 (4th Cir.1998); Doe, 138 F.3d at 659-61; *Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart Hosp.)*, 133 F.3d 237, 244 (3d Cir.1998); *Clark v. California*,

123 F.3d 1267, 1271 (9th Cir.1997), *cert. denied*, 118 S.Ct. 2340 (1998); *Mills v. Maine*, 118 F.3d 37, 43 (1st Cir.1997); *Hurd*, 109 F.3d at 1545; *Crawford*, 109 F.3d at 1283. We join the conclusion of our sister circuits and hold that *Seminole Tribe* did not alter the analysis by which we determine the constitutional authority for the enactment of a statute. We now turn to the issue of whether Section 5 of the Fourteenth Amendment provided Congress with the authority to enact the 1974 amendments to the ADEA.

**b.**

Section 1 of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," while Section 5 grants Congress the enforcement power to effectuate the goals of the amendment.

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce the submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*Ex parte Virginia*, 100 U.S. 339, 345-46 (1879). A statute is "appropriate legislation" under Section 5 of the Fourteenth Amendment if the enactment is " 'plainly adapted' " to enforcing the Equal Protection Clause and "not prohibited by but is consistent with 'the letter and spirit of the [C]onstitution.' " *Katzenbach v. Morgan*, 384 U.S. 641, 651

(1966) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

Congress did not expressly cite Section 5 of the Fourteenth Amendment in its enactment of the 1974 amendments to the ADEA. However, in originally enacting the ADEA, Congress detailed the problems that it hoped the statute would address. In this regard, Congress made the following findings:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the *setting of arbitrary age limits regardless of potential for job performance* has become common practice, and certain otherwise desirable practices may work to the disadvantage of old persons;
>
> (3) the incidence of unemployment, especially long-term employment [sic] with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, *of arbitrary discrimination in employment because of age*, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (emphasis added). After "extensive factfinding undertaken by the Executive Branch and Congress" of age discrimination in employment, *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983), Congress concluded that "older workers were being deprived of employment

on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Although Congress expressly invoked the Commerce Clause in the introductory statement to the House Report on the 1974 amendments to the ADEA, *see* H. Rep. No. 93-313, *reprinted in* 1974 U.S.C.C.A.N. 2811, 1974 WL 11448, at *3, the portion of the report discussing the amendments focuses on the need to remedy the problem of age discrimination, not on the impact of that discrimination on commerce. *See id.* at *84-*85. This emphasis on the injustice of discrimination based on age indicates that the 1974 amendments were remedial legislation enacted under Congress's Section 5 power. *See, e.g., Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699-700 (1st Cir.1983); *Elrod*, 674 F.2d at 604, 605 (concluding that Congress's objective in the 1974 amendments "was to prohibit arbitrary discriminatory government conduct that is the very essence of the guarantee of equal protection of the laws of the Fourteenth Amendment"). Based on the apparently remedial nature of the statute, we agree that Congress enacted the legislation pursuant to the Commerce Clause *and* the Fourteenth Amendment.

The fact that Congress did not expressly invoke the authority of Section 5 of the Fourteenth Amendment when it enacted the amendments to the ADEA is not fatal. *Wyoming*, 460 U.S. at 243-44 n. 18; *Franks*, 142 F.3d at 363 (holding Title IX, which lacks any explicit language regarding the Fourteenth Amendment, to be a valid exercise of Congress's Fourteenth Amendment enforcement power); *Timmer*, 104 F.3d at 839 (holding that Equal Pay Act, which lacks an express statement of the constitutional basis of the extension of the Fair Labor Standards

Act to the states, authorized by Section 5 of Fourteenth Amendment).

Accordingly, we reject the University's contention that Congress did not in fact enact the 1974 amendments to the ADEA pursuant to its Section 5 power. "The . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). "Although a court must be able to discern support for the exercise of § 5 power '[t]hat does not mean . . . that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.' " *Timmer*, 104 F.3d at 840 (quoting *Wyoming*, 460 U.S. at 243). When Congress extended the application of the ADEA to the states in 1974, it clearly intended to prohibit the states from arbitrarily discriminating on the basis of age in the employment setting, and the Fourteenth Amendment empowered Congress to do so. *See Elrod*, 674 F.2d at 604 (stating that "it is clear that the purpose of the [1974 amendment] was to prohibit arbitrary, discriminatory government conduct that is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment."). We see no reason to frustrate that intent simply because the ADEA's legislative history does not contain the words "Section 5 of the Fourteenth Amendment."

**2.**

**a.**

The University argues in the alternative that even if Congress intended to legislate under its Section 5 authority,

such an exercise of that power was invalid. It contends that the ADEA exceeds Congress's Section 5 enforcement authority because age is not a suspect or quasi-suspect class, and judicial review of a law involving an age classification is only subject to rational review. According to the University's reasoning, the Fourteenth Amendment cannot be the source of authority for federal legislation prohibiting employers from age-based discrimination because such discrimination does not implicate the Equal Protection Clause.

We disagree. The Supreme Court's equal protection jurisprudence is not confined to suspect or quasi-suspect classifications. *See Scott*, 1998 WL 422655 at *4; *Mills*, 118 F.3d at 46. In addition, the Supreme Court has indicated that the Equal Protection Clause reaches age discrimination. *See Vance v. Bradley*, 440 U.S. 93 (1979) (applying equal protection analysis to a class based on age); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) (same); *see also Scott*, 1998 WL at *4; *Goshtasby*, 141 F.3d at 770-71 (regarding the Supreme Court's entertainment of equal protection claims based on age classification as affirming the extension of the Equal Protection Clause to classes drawn by age).

Moreover, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure *every person* within the state's jurisdiction against intentional and arbitrary discrimination." *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918) (emphasis added); *see also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (emphasizing that the Equal Protection Clause's general requirement is that all persons similarly situated are treated alike). Thus, the fact

that age is not a suspect classification does not eliminate the Equal Protection Clause as a source authorizing Congress to prohibit age-based discrimination; accordingly, Congress did not exceed the scope of its Section 5 authority in enacting the 1974 amendments to the ADEA.

**b.**

The University also invokes the Supreme Court's decision in *City of Boerne* to argue that the scope of the ADEA is so expansive that it is substantive rather than remedial in nature and, thus, is not a valid exercise of Congress's Section 5 enforcement power. *See* 117 S.Ct. 2157, 2164 (1997).[5]

In *City of Boerne,* the Court held that RFRA was an unconstitutional exercise of Congress's Section 5 power because it was "so out of proportion" to the problems identified by RFRA that the statute could not be regarded as enforcing the provisions of the Fourteenth Amendment. *Id.* at 2170. The Court arrived at its conclusion after

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[5] In *City of Boerne,* the Supreme Court considered the constitutionality of the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* Congress enacted RFRA in response to the Supreme Court's decision in *Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872 (1990). In *Smith,* the Court held that the Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when such laws significantly burden religious practices. *See id.* at 887. Through RFRA, Congress attempted to circumvent *Smith* legislatively by imposing a requirement that laws which substantially burden a person's exercise of religion must be justified as furthering a compelling state interest and as the least restrictive means of doing so. *See* 42 U.S.C. § 2000bb-1.

making three determinations. The Court determined first that there was not a "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 2171. Second, it found that RFRA imposed "the most demanding test known to constitutional law." *Id.* In the Court's view, this standard created a likelihood of invalidating many state laws. *See id.* Third, the Court found that RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance" because it was such a sweeping response by Congress that it could be interpreted as an attempt to expand the substantive meaning of the Fourteenth Amendment rather than being remedial in nature. *See id.* at 2172.

Through its analysis in *City of Boerne*, the Supreme Court provided us with additional guidance to that supplied by *Seminole Tribe* for determining whether a statute is appropriate legislation under Congress's Section 5 enforcement power. Legislation which deters or remedies constitutional violations falls within "the sweep of Congress' enforcement power." *Id.* at 2163. However, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation." *Id.* at 2164.

In order for a statute to be remedial under *City of Boerne*, and thereby within Congress's enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 2164. In making a proportionality inquiry,

the *City of Boerne* Court instructed that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169 (citation omitted). The Fifth Circuit has restated the Court's holding in the form of a workable inquiry: "This proportionality inquiry has two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations." *See Scott*, 1998 WL 422655 at *5 (quoting *Coolbaugh v. Louisiana*, 136 F.3d 430, 435 (5th Cir.1998), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 28, 1998)). We now turn to each of these considerations.

Congress's legislative findings in enacting the ADEA, recited previously in this opinion, are helpful in determining the extent of the threatened constitutional violations. In enacting the ADEA, Congress detailed the "evil" that Congress was addressing: that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co.*, 507 U.S. at 610. As mentioned, the evidence before Congress established that qualified workers were being fired, not hired, and paid less because of their age. The evidence also indicated that employers used age as an arbitrary proxy for ability. *See Wyoming*, 460 U.S. at 231. Congress later established that these same conditions existed in the public sector. *See* S.Rep. No. 846, 93d Cong., 2d Sess. 112 (1974); Senate Special Comm. on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess. 14 (Comm. Print 1973); *Elrod*, 674 F.2d at 605 ("The passage of [the amendments to the ADEA] insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as

are employees in the private sector." (quoting remarks of Sen. Bentsen, 120 Cong. Rec. 8768 (1974))). Finally, both the House and Senate cited President Nixon's remarks in 1972 to indicate the congressional purpose of the 1974 amendment:

> Discrimination based on age – what some people call "age-ism" – can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation[ ] the contribution they could make if they were working.

*Elrod*, 674 F.2d at 605 (quoting S.Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974), and H.R.Rep. No. 93-313, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.S.C.A.N. 2811, 2849). Thus, Congress concluded that the practice of using age classifications in employment, in both the private and public sector, violated the Constitution because such classifications are arbitrary and discriminatory.

Pursuant to *City of Boerne*, we must also determine whether the scope of the ADEA is so sweeping that the statute is disproportionate to the "evil" Congress sought to eradicate. *See Scott*, 1998 WL 422655 at *5 (citing *Coolbaugh*, 136 F.3d at 437-38). The purpose of the ADEA is "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). The ADEA attempts to prevent discrimination against older Americans by requiring that employer determinations be based on merit. *See Hazen*

*Paper*, 507 U.S. at 611 ("The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly."). Thus, the ADEA requires case-by-case determinations based on facts. *Id.*; *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985).

Although the ADEA may prohibit some conduct not prohibited by the Constitution, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is itself not unconstitutional." *City of Boerne*, 117 S.Ct. at 2163. The *City of Boerne* Court explained that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 2164. Thus, even after the *City of Boerne*, the fact that some ADEA provisions may exceed constitutional requirements does not render the statute so disproportionate to its purpose that it represents an invalid exercise of Congress's enforcement power. *See Scott*, 1998 WL at *7; *Goshtasby*, 141 F.3d at 772.

Accordingly, we conclude that the amendments to the ADEA do not create substantive rights but, instead, are remedial in nature because the scope of the legislation is not disproportionate to the scope of the threatened constitutional violations. *See Scott*, 1998 WL at *7; *Goshtasby*, 141 F.3d at 772 (stating that "unlike the statute at

issue in *City of Boerne*, which imposed 'the most demanding test known to constitutional law,' the ADEA is narrowly drawn to protect older citizens from arbitrary and capricious action by the state" (citations omitted)).

## IV.

We hold that Congress intended to abrogate the states' Eleventh Amendment immunity from suit by its enactment of the 1974 amendments to the ADEA, and that it had the authority to do so pursuant to Section 5 of the Fourteenth Amendment. We therefore **REVERSE** and **REMAND** this cause to the district court for further proceedings in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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DALVIN M. COGER, et al.,

Plaintiffs,

VS. No. 89-2374-GA

BOARD OF REGENTS, et al.,

Defendants.

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Filed 97 Jan. 2)

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Before the court is defendants' motion to dismiss pursuant to Rule 12(b)(1) (lack of jurisdiction over subject matter) and Rule 12(b)(6) (failure to state a claim upon which relief can be granted). Defendants are the State Board of Regents, the University of Memphis, and former university president Thomas G. Carpenter. Plaintiffs, who are current or retired faculty members at the University of Memphis, sue under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* They seek recovery under both disparate impact and disparate treatment theories. For the following reasons, defendants' motion is granted and this case is dismissed in its entirety.

Defendants' present motion rests on the recent United States Supreme Court case *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). The importance of *Seminole Tribe* lies not only in the Court's affirmation of the

appropriate test to be applied in an Eleventh Amendment immunity analysis, but in the application of the test. The Court iterated the proper test of whether Congress has abrogated the States' sovereign immunity: first, Congress must "unequivocally express[ ] its intent to abrogate the immunity"; and second, Congress must have acted "pursuant to a valid exercise of power." *Id.* at 1123 (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). In applying the second part of the test, however, the Court overruled prior case law that had allowed Congress to abrogate the states' immunity pursuant to the Commerce Clause.[1] The Court held the Fourteenth Amendment to be the only source of power sufficient to support a congressional abrogation of the states' Eleventh Amendment immunity. *Id.* at 1124.

Defendants now argue not only that Congress failed to unequivocally express its intent to abrogate the states' immunity under the ADEA, but also that Congress passed the ADEA pursuant to the Commerce Clause. Thus, defendants contend that neither the first nor the second prong of the appropriate test has been met. If defendants' arguments are correct, it is undisputed that the Eleventh Amendment would bar the ADEA lawsuit in

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[1] Prior to *Seminole Tribe*, the Court had recognized two sources of Congressional abrogation authority. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court first recognized the Fourteenth Amendment as a valid source for such power. Thirteen years later, in the highly criticized case *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989), the Court held the Commerce Clause to be an equally valid source. Thus *Seminole Tribe* overruled *Union Gas*.

the present case.[2] The court would lack jurisdiction over the claim and the case would necessarily be dismissed.

Plaintiffs counter, however, that when Congress enacted the 1974 amendments to the ADEA, expanding the definition of "employer" to include states and state actors, Congress made its intent to abrogate the states' Eleventh Amendment immunity unequivocally clear. Furthermore, plaintiffs insist that in passing these amendments, Congress clearly intended to act pursuant to section five of the Fourteenth Amendment. Thus, plaintiffs argue the present lawsuit should not be barred by the Eleventh Amendment.

In 1967, Congress enacted the Age Discrimination in Employment Act with the stated purpose of "promot[ing] employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b). The ADEA prohibits all employers from discharging employees because of their age, or from classifying employees in a way that would affect their status as employees because of their age. 29

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[2] It is undisputed that the defendants are arms of the state for Eleventh Amendment purposes. Furthermore, there is nothing in the record to suggest that the state has waived its immunity with respect to the ADEA claims.

Although neither party has briefed the issue, even after *Seminole Tribe*, an individual may bring suit against a state officer to obtain injunctive relief in order to remedy the officer's ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123 (1908). Although plaintiffs originally sought injunctive relief, the only remaining individual defendant is *former* university president Carpenter. Defendant Carpenter is not the proper party from whom to seek prospective injunctive relief as he is no longer a state officer involved in any alleged ongoing violation of federal law.

U.S.C. § 623(a). As originally enacted, the ADEA applied neither to the federal government nor to the states or their political subdivisions. In 1974, Congress extended the substantive prohibitions of the Act to the federal and state governments by amending the definition of "employer" and "employee." 29 U.S.C. § 630(b) & (f).[3] Plaintiffs contend that the 1974 amendments clearly indicate Congress' intent to abrogate the states' Eleventh Amendment immunity.

In *Atascadero State Hospital v. Scanlon,* 473 U.S. 235 (1985), the United States Supreme Court defined the degree of specificity that Congress must meet when drafting a federal statute to abrogate the states' Eleventh Amendment immunity. The Court made it clear that Congress may abrogate the Eleventh Amendment "only by making its intention unmistakably clear in the language of the statute." *Id.* at 242.

Applying this standard to the Rehabilitation Act of 1973, the *Atascadero* Court failed to find the requisite clarity to remove the states' immunity. The Rehabilitation Act provided that "the remedies, procedures, and rights set forth . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance. . . . " While acknowledging that the state was a recipient of federal aid, the Court explained that "[a] general authorization for suit in federal court is not the

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[3] As amended, 29 U.S.C. § 630(b) provides in relevant part: "The term [employer] also means . . . (2) a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency. . . . "

kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Id.* at 246.

The Supreme Court later reaffirmed and clarified the *Atascadero* standard in *Dellmuth v. Muth*, 491 U.S. 223 (1989). *Dellmuth* addressed whether Congress had effectively abrogated the states' sovereign immunity under the Education of the Handicapped Act ("EHA"). The plaintiff relied on language in the EHA that made reference to the states. The preamble referred the congressional finding that it was in the national interest to assist the states in meeting the educational needs of handicapped children to ensure equal protection of the law. Another provision of the EHA authorized aggrieved parties to bring civil actions in any state or federal court. In addition, a subsequent amendment to the EHA referred to the fact that attorney's fees could not be reduced if the court found that the state unreasonably protracted the final resolution of the action, or there was a violation of the EHA. *Id.* at 228. Despite this language, the court held that the EHA did not satisfy the clear statement requirement.

The Court began its Eleventh Amendment analysis by revisiting *Atascadero*:

> Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is "unmistakably clear in the language of the statute." . . . Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in

> this area of the law, evidence of congressional intent must be both unequivocal and textual.

*Id.* at 230 (quoting *Atascadero*, 473 U.S. at 242). Applying this standard to the EHA, the Court explained that "it could not be said with perfect confidence" that Congress intended to abrogate the states' immunity, and "imperfect confidence will not suffice." *Dellmuth*, 491 U.S. at 231. The Court concluded by observing that the "EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity. . . . Nor does any provision cited . . . address abrogation in even oblique terms, much less with the clarity *Atascadero* requires." *Id.* Thus, the Supreme Court served notice that the *Atascadero* standard would be strictly applied.

Plaintiffs in the present case rely on three circuit court cases to support their argument that Congress has waived the states' immunity under the ADEA. Plaintiffs cite *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983); *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982); and *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977), for the proposition that the ADEA contains a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity. These cases were decided well before *Atascadero* or *Dellmuth*. As a result, they do not apply the appropriate test to determine whether the states' immunity was effectively abrogated. In fact, neither *Arritt* nor *Elrod* contain a separate Eleventh Amendment analysis; they explicitly address only Congress' authority to pass the ADEA under the Fourteenth Amendment.[4] Although

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[4] In fact, the *Elrod* court did not address Eleventh Amendment immunity other than in a footnote citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), for the proposition that the

*Ramirez* does address the Eleventh Amendment issue directly, the court labored under the belief that Congress could abrogate the states' immunity by "fair implication." *Id.* at 700. After *Atascadero*, however, Congress must speak with a much clearer voice than was required under *Ramirez*.

It is instructive, however, to visit the case of *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989), *overruled on other grounds, Seminole Tribe*, 116 S.Ct. at 1131, in which the Supreme Court held that Congress unequivocally waived the states' immunity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). The Court found in CERCLA's text the clear and unmistakable statutory language it found lacking in the EHA and the Rehabilitation Act.

In reaching its conclusion in *Union Gas*, the Court relied on several provisions of CERCLA. Under CERCLA's liability scheme, persons who own or operate hazardous waste facilities or who transport or dispose of hazardous waste are liable for all costs of removal and remediation at the site. 42 U.S.C. § 9607(a). The Court first noted that states are expressly included in the statute's definition of "persons" potentially liable under CERCLA. To prevent possible misinterpretation, however, the Court made clear that it was "not say[ing] that CERCLA's definition of "persons" alone overrides the

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Eleventh Amendment, like the Tenth Amendment, is limited by the Fourteenth Amendment. *Elrod*, 674 F.2d at 609 n.10.

States' immunity." *Union Gas*, 491 U.S. at 8 n.2. Such a holding would have conceivably been inconsistent with *Atascadero*. The Court went on to emphasize that CERCLA expressly provides that states are to be treated in exactly the same manner as nongovernmental owner/operators, in all but one circumstance, including liability. 42 U.S.C. § 9601(20)(D). The Court also found it "highly significant" that Congress used language almost identical to the language of the provision waiving federal immunity to CERCLA suits in the state liability section.

Another section of CERCLA provides an exception to states' liability for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." The statute continues, "[t]his paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government." *Id.* § 9607(d)(2). The Court concluded that the limitations on the states' liability presupposed that states were liable as a general rule. *Union Gas*, 491 U.S. at 8. Based on all of the above considerations, the Court held that "CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court." *Id.* at 13.[5]

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[5] A similar analysis can be made in reference to *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (decided prior to *Atascadero*), in which the Court held that congressional authorization to sue the State is clearly present under Title VII as amended in 1972. Plaintiff has argued that any interpretation of the ADEA amendments should parallel an interpretation of the Title VII amendments. Unlike the ADEA amendments, however, when Congress amended Title VII it did more than simply expand the

When compared to the statutory language interpreted by the Court in *Union Gas*, it becomes clear that the language of the ADEA falls short of the clarity required under *Atascadero*. *See also Mondie v. Shelby State Community College*, Case No. 95-2370-YUV (W.D. Tenn. April 5, 1996). In arguing that Congress unequivocally stated its intent to abrogate the states' immunity, the plaintiffs have relied exclusively on Congress' expansion of the definitions of "employer" and "employee." Plaintiffs are unable to point out, and the court is unable to find, any other language indicating Congress' intent to abrogate the states' sovereign immunity. Congress makes no reference in any provisions of the ADEA, or its amendments, to the states' immunity from federal court lawsuits, nor does any inference of waiver exist. As the Supreme Court previously implied, the expansion of the definitions of "employer" and "employee" alone is not sufficient to override the sovereign immunity of the states. The court cannot say with "perfect confidence"

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definition of "person" to include the states. As the *Fitzpatrick* Court pointed out, the 1972 Title VII Amendments also retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, and explicitly made clear that the right was being extended to persons aggrieved by public employers. *Id.* at 448 n.2 (citing 1972 Amendments, § 4(a), 42 U.S.C. §§ 2000e-5(a)-(g) ("[T]he Attorney General [ ] may bring a civil action . . . in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene . . . in a case involving a government, governmental agency, or political subdivision. . . . [If] the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, . . . a civil action may be brought . . . by the person claiming to be aggrieved.").

that Congress has unequivocally and textually waived the states' immunity under the ADEA amendments, and "imperfect confidence" will not suffice.[6] *See Dellmuth*, 491 U.S. at 231.

Even if this court were to find that Congress had made its intent to waive the states' immunity unequivocally and textually clear, the attempted waiver would be ineffective because the ADEA and the 1974 amendments were passed pursuant to Congress' Commerce Clause powers. *See Black v. Goodman*, 736 F.Supp. 1042 (D. Mont. 1990); *Farkas v. New York State Department of Health*, 554 F.Supp. 24 (N.D.N.Y. 1982), *aff'd* 767 F.2d 907 (1985), *cert. denied*, 474 U.S. 1033 (1985); *MacPherson v. University of*

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[6] Contrary to plaintiffs' arguments, the court's conclusion on the Eleventh Amendment issue does not invalidate the ADEA as amended. The ADEA remains constitutionally valid legislation and is still applicable to the states. Even absent a state's waiver of the Eleventh Amendment immunity, which of course is still possible, several avenues remain open for ensuring state compliance with federal law. While private citizens cannot sue the states in federal court to enforce their rights under this legislation, other plaintiffs, such as the federal government, may bring suit in federal court against a state. *See Employees of Public Health & Welfare v. Missouri*, 411 U.S. 279, 285-86 (1973) (Failure to properly abrogate the states' Eleventh Amendment immunity operates to foreclose private enforcement suits only; it does not "make extension of coverage to state employees meaningless," since enforcement of the Act by an appropriate federal agency is still available); *United States v. Texas*, 143 U.S. 621, 644-45 (1892) (finding such power necessary to the "permanence of the Union"). Furthermore, an individual can bring suit against a state officer seeking injunctive relief in order to ensure that the officer's conduct is in compliance with federal law. *See Ex Parte Young*, 209 U.S. 123 (1908).

*Montevallo*, 1996 WL 521201 (N.D. Ala. 1996); *Mondie v. Shelby State Community College*, Case No. 95-2370-YUV (W.D. Tenn. April 5, 1996).

Prior to *Seminole Tribe*, the Supreme Court had only held that the extension of the ADEA to state and local governments was a valid exercise of Congress' Commerce Clause powers. *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). The Court declined to decide, however, whether the ADEA was also enacted pursuant to section five of the Fourteenth Amendment. *Id.* at 243. Neither the Supreme Court nor the Sixth Circuit has yet determined whether the 1974 amendments to the ADEA were passed pursuant to Congress' Fourteenth Amendment powers.[7]

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[7] Defendants argue that *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and its progeny establish the test to be applied in determining whether Congress enacted legislation under the Fourteenth Amendment. It is true that the *Pennhurst* Court cautioned that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Read in context, however, *Pennhurst* only requires a clear statement of the source of authority where there is doubt as to whether Congress intends to impose mandatory duties on state and local governments. *Id.* at 15 (examining whether Congress intended "to impose an obligation on the states to provide, at their own expense, certain kinds of [medical] treatment"). In *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991), the Court clearly explained that the *Pennhurst* rule is a "rule of statutory construction to be applied when the statutory intent is ambiguous." *See also EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) ("like all rules of statutory construction, [the *Pennhurst* rule is] a tool with which to divine the meaning of otherwise ambiguous statutory intent"). In absence of this type of ambiguity, the Supreme Court has never applied the *Pennhurst* rule to determine if Congress passed legislation pursuant to the Fourteenth Amendment.

As plaintiffs point out, several circuit courts have held that Congress enacted the ADEA under the Fourteenth Amendment. *Heiar v. Crawford County*, 746 F.2d 1190, 1194 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (following *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) (decided before *EEOC v. Wyoming*). *See also Hurd v. Pittsburgh St. Univ.*, 821 F. Supp. 1410 (D. Kan. 1993), *aff'd* 29 F.3d 564 (1994), *cert. denied*, 115 S.Ct. 321 (1994); *Swanson v. Dept. of Health*, 773 F. Supp. 255 (D. Colo. 1991). *But see Black v. Goodman*, 736 F.Supp. 1042 (D. Mont. 1990); *Farkas v. New York State Department of Health*, 554 F.Supp. 24 (N.D.N.Y. 1982), *aff'd* 767 F.2d 907 (1985), *cert. denied*, 474 U.S. 1033 (1985); *MacPherson v. University of Montevallo*, 1996 WL 521201 (N.D. Ala. 1996); *Mondie v. Shelby State Community College*, Case No. 95-2370-YUV (W.D. Tenn. April 5, 1996).

On the other hand, four members of the Supreme Court have concluded that the ADEA amendments were not and could not have been enacted under the authority of the Fourteenth Amendment. *Wyoming*, 460 U.S. at 259-63 (Burger, C.J., joined by Powell, J.; Rehnquist and O'Connor, J.J., dissenting). In their analysis, the ADEA amendments could only be sustained under the Fourteenth Amendment if it were assumed that Congress could define rights independently of case law, and that Congress had done so in the ADEA. The dissenters agreed with neither proposition. *Id.* at 262. Simply put, Congress' intent "to shield public employees from the effects of age-based discrimination," *Ramirez*, 715 F.2d at 699, is not sufficient to bring the ADEA amendments

within the Fourteenth Amendment's guarantee of "equal protection of the law."

Of those courts holding that Congress passed the ADEA pursuant to the Fourteenth Amendment, most rely heavily on an analogy to the 1972 amendments to Title VII. Admittedly, the ADEA and Title VII parallel each other in many respects. On the abrogation issue, however, the analogy fails because Congress explicitly relied on the Fourteenth Amendment when it applied Title VII to the states. The 1974 ADEA amendments, proposed at the same time as Title VII's enactment, contained no such clear statement. Although it is not necessary that Congress specifically refer to its reliance on the Fourteenth Amendment, *Wyoming*, 460 U.S. at 243 n.18, if the same result was intended with parallel legislation, Congress most likely would have explicitly relied on the Fourteenth Amendment in both instances.

The court declines to view this omission as a careless oversight, but rather characterizes it as a material difference in the legislation. Congress could have used identical language in both Title VII and the ADEA amendments. "The fact that it chose not to do so must be given heed. *Cf.* 2A N. Singer, *Sutherland Statutory Construction*, § 57.06 at 654 (Sands 4th ed. 1984) ('[c]ontrasting language in similar statutes may show that the legislature intended different standards of compliance.')." *United States v. $359,500*, 828 F.2d 930, 933 (2d Cir. 1987).

As defendants point out, the ADEA has always been closely tied to the Fair Labor Standards Act ("FLSA").[8] Congress passed legislation amending the FLSA two years after the amendments to Title VII. Section 28(a) of the FLSA amendments of 1974, P.L. 93-259, 88 stat. 74, 1974 U.S.C.C.A.N. at 78, amended the ADEA to include the states in the term "employer." It is clear that the 1974 amendments to FLSA were enacted exclusively under Congress' Commerce Clause powers.[9] There is no

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[8] In a recent Sixth Circuit case *Wilson-Jones v. Caviness*, 1996 WL 625589 (6th Cir. (Ohio)), the United States Court of Appeals for the Sixth Circuit, applying the two-part test of *Seminole Tribe*, held that the FLSA could not be regarded as an enactment to enforce the Equal Protection Clause. Thus the employees' FLSA claim against the state was barred. Applying the second part of the *Seminole Tribe* test, the court first found that the FLSA was actually passed pursuant to the Commerce Clause, but went on to hold that the Act could not have been passed pursuant to the Fourteenth Amendment. This court notes that under *Seminole Tribe*, the only necessary question is whether the Act was actually passed pursuant to the Fourteenth Amendment. *Seminole Tribe*, 116 S.Ct. at 1126 ("Thus our inquiry . . . is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"). This conclusion is consistent with both a plain reading of *Seminole Tribe* and the Supreme Court's recent trend towards increased protection of states' sovereignty. *Seminole Tribe* dramatically cuts back Congress' power to abrogate the states' immunity. A finding that an infringement on a state's sovereignty is valid simply because Congress "could have" acted pursuant to the Fourteenth Amendment runs contrary to the principles of *Seminole Tribe*.

[9] The basic policy of the FLSA is contained in its second section:

> (a) The Congress hereby finds that the existence, in industries engaged in commerce, or in the production

separate legislative statement to indicate that Congress passed the amendments to the ADEA under an independent source of authority. *See MacPherson* 1996 WL 521201, at *3 ("[T]he court finds defendant's reasoning that the ADEA was passed along with the Fair Labor Standards Act pursuant to the same vehicle, the Commerce Clause, more plausible.").

Based on the foregoing analysis, the court concludes that Congress did not sufficiently state its intent to abrogate the states' immunity under the ADEA and that the 1974 amendments to the ADEA were not adopted pursuant to Congress' power under the Fourteenth Amendment. Accordingly, plaintiffs' claims against defendants

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> of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce in the free flow of goods in commerce; and (5) [sic] interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its powers to regulate commerce among the several States and with foreign nations, to correct and . . . to eliminate conditions above referred to. . . .

House Report No. 93-913, 1974 U.S.C.C.A.N. at 2811-12.

The purpose of the FLSA amendments, as stated by Congress, is to "implement the policy of the Act [FLSA]." *Id.* at 2812.

are barred by the Eleventh Amendment. The case is dismissed in its entirety.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES
DISTRICT JUDGE

January 2, 1997
DATE

## STATUTES INVOLVED

Sections 626(b) and (c) of the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621, *et seq.*) provide as follows:

**§ 626. Recordkeeping, investigation, and enforcement**

* * *

**(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to

be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

**(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * *

Sections 630(b) and (f) of the ADEA provide as follows

**§ 630. Definitions.**

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working

day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

Section 216(b) of the Fair Labor Standards Act of 1938 provides:

**§ 216. Penalties.**

* * *

**(b) Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to

any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * *

Supreme Court, U.S.
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No. 98-821

In The

# Supreme Court of the United States

October Term, 1998

BOARD OF REGENTS OF THE STATE OF TENNESSEE, ET AL.,

*Petitioners,*

v.

DALVAN M. COGER, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the 1974 Amendments to the Age Discrimination in Employment Act of 1967 contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the 1974 Amendments to the Age Discrimination in Employment Act of 1967, authorizing suit for monetary relief against the States, was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 154 F.3d 296 (6th Cir. 1998). The opinion of the district court (Pet. App. 26-41) is unreported.

## JURISDICTION

The court of appeals entered its judgment on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

1. This action was filed in 1989 by seventeen (17) senior faculty members of Memphis State University (now the University of Memphis) who were employed by the University in ten (10) different departments. The lawsuit asserted claims against the State and State officials for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The district court, sitting without a jury, heard Plaintiffs' proof during the course of twenty-one (21) days of trial. At the conclusion of Plaintiffs' proof, Defendants filed motions, pursuant to Rule 52(c) for judgment on partial findings. On May 24, 1996, the district court entered an Order denying Defendants' motions as to most of Plaintiffs' claims. In its Order, the District Court found, among other things, that Plaintiffs had "produced sufficient evidence to permit a finding that age discrimination was defendants' standard

operating procedure." (Docket Entry #235 at 52). The district court further found that Plaintiffs' statistical proof was "sufficiently compelling [to demonstrate] age-based disparity of treatment" and "a background from which a pattern or practice of discrimination could easily emerge." (Docket Entry #235 at 52). Additionally, the district court found that there was "direct evidence of discriminatory animus at the highest levels of the university administration focused on older faculty members throughout the university . . . far beyond insignificant, isolated or sporadic acts". (Docket Entry #235 at 52-53).

Subsequent to entry of that Order, and before the trial resumed to hear Defendants' evidence, this Court decided the case of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Defendants then moved to dismiss on the basis of Eleventh Amendment immunity and, on January 2, 1997, without resuming trial to hear Defendants' proof, the district court entered an Order dismissing the ADEA action in its entirety on the basis that the State of Tennessee enjoyed Eleventh Amendment immunity against ADEA actions.

2. Plaintiff's filed a timely appeal of the district court's decision and the United States intervened on appeal pursuant to 28 U.S.C. § 2403(a). The Court of Appeals for the Sixth Circuit subsequently reversed the decision of the district court. *See Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998). The court of appeals held "that Congress made its intent to abrogate the states' immunity against ADEA suits imminently clear". *Coger*, 154 F.3d at 302. The court reasoned that the intent of Congress to abrogate States' immunity is found by the expansion of the definition of "employer" to encompass

"a state or political subdivision of the state and any agency or instrumentality of the state". *Id.* at 301. Congress amended this definition knowing that express provisions of the ADEA provide that an employer who violates the statute is liable for legal and equitable relief. *Id.*

The court of appeals also held that "Congress did not exceed the scope of its Section 5 authority" in extending the ADEA to the states. *Id.* at 305. In concluding that Congress had validly exercised its Section 5 powers, the court noted Congress's extensive factual findings detailing substantial instances of arbitrary discrimination because of age. *Id.* at 304. The court noted that "evidence before Congress established that qualified workers were being fired, not hired, and paid less because of their age," and as well that "employers used age as an arbitrary proxy for ability". *Id.* Noting the "wide latitude" afforded Congress, the Sixth Circuit determined that the scope of the ADEA was not so broad as to be disproportionate. *Id.* at 307 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

## ARGUMENT

The Sixth Circuit correctly decided that the 1974 Amendments to the ADEA clearly express Congress's intent to abrogate Eleventh Amendment immunity. Further, the court of appeals correctly held that in abrogating States' Eleventh Amendment immunity Congress acted pursuant to a valid exercise of Section 5 authority to

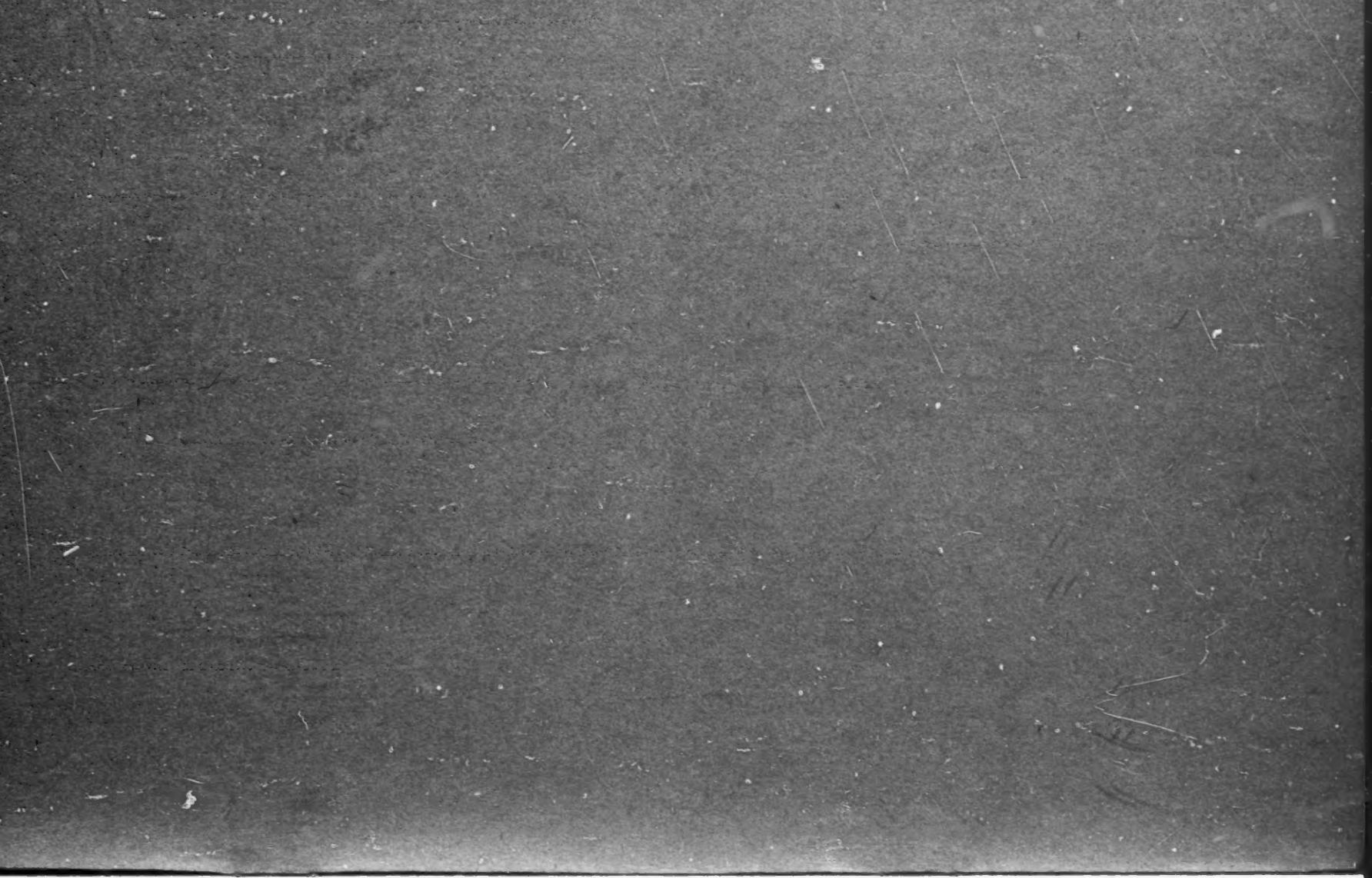
enforce the Equal Protection Clause of the Fourteenth Amendment.

The decision of the Sixth Circuit is consistent with five (5) circuits that have addressed the same issue. *See Cooper v. New York State Office of Mental Health,* 162 F.3d 770 (2d Cir. 1998); *Migneault v. Peck,* 158 F.3d 1131 (10th Cir. 1998); *Keeton v. University of Nevada Sys.,* 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Mississippi,* 148 F.3d 493 (5th Cir. 1998); and *Goshtasby v. Board of Trustees,* 141 F.3d 761 (7th Cir. 1998). However, Plaintiffs-Respondents recognize that two (2) circuits have reached a different conclusion. *See Humenansky v. Regents of Univ. of Minn.,* 152 F.3d 822 (1998) and *Kimel v. State of Florida Bd. of Regents,* 139 F.3d 1426 (11th Cir. 1998). Additionally, Plaintiffs-Respondents recognize that certiorari has been granted by the Court in *Kimel v. State of Florida Board of Regents,* 139 F.3d 1426 (11th Cir. 1998), *cert. granted,* 67 U.S.L.W. 3348, 67 U.S.L.W. 3380, 67 U.S.L.W. 3464, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) (No. 98-791). Plaintiffs-Respondents respectfully submit that the Petition for Writ of Certiorari of the State of Tennessee should be held pending disposition of *Kimel v. State of Florida Bd. of Regents, supra,* or in the alternative, this Petition should be denied since the Sixth Circuit correctly decided these issues.

Respectfully submitted,

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No. 98-821

# In the Supreme Court of the United States

OCTOBER TERM, 1998

TENNESSEE BOARD OF REGENTS, ET AL., PETITIONERS

*v.*

DALVAN M. COGER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

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No. 98-821

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 154 F.3d 296. The opinion of the district court (Pet. App. 26-41) is unreported.

### JURISDICTION

The court of appeals entered its judgment on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b)

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. II 1996). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (Supp. II 1996); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. II 1996). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. II 1996). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. II 1996) (state).

("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. Respondents are seventeen faculty members employed by petitioner Memphis State University (which is now known as the University of Memphis). Pet. App. 4. In 1989, respondents filed suit in federal district court alleging, among other things, that petitioners engaged in individualized disparate treatment against them, undertook a pattern or practice of discrimination, and adopted policies with a disparate impact, all in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 4. Following discovery and a bench trial, the district court entered partial findings rejecting the individual disparate treatment claims of eight faculty members. Petitioners subsequently moved to dismiss on the ground that the Eleventh Amendment barred the litigation, citing this Court's intervening decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). Pet. App. 5.

The district court granted the motion to dismiss, holding that the ADEA lacks a clear textual statement evidencing Congress's intent to abrogate the States' Eleventh Amendment immunity. Pet. App. 34-35. In the alternative, the court found that any abrogation would be invalid because Congress did not intend to exercise its authority under Section 5 of the Fourteenth Amendment when it enacted the ADEA. *Id.* at 35-41.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Elev-

enth Amendment immunity in the ADEA. The court of appeals reversed. Pet. App. 1-25.

The court first held that the ADEA made "eminently clear" Congress's intent to abrogate Eleventh Amendment immunity by "expanding the definition of 'employer' to encompass 'a State or political subdivision of a State and any agency or instrumentality of a State,'" knowing that "the ADEA provides that an employer who violates the statute is liable for legal and equitable relief." Pet. App. 9-10, 11 (citations omitted). While noting that the Eleventh Circuit, in *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (1998), had reached the opposite conclusion, the court of appeals "join[ed] other appellate courts which have addressed this issue since the *Seminole Tribe* decision and have also determined that the definitional and enforcement provisions of the ADEA contain the necessary clear statement of Congress's intent to abrogate state sovereign immunity." Pet. App. 12.

The court of appeals also agreed with a number of other courts of appeals in concluding that "Congress did not exceed the scope of its Section 5 authority" in extending the ADEA to the States. Pet. App. 20. Applying *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the court held that Congress had a basis in fact for concluding that older workers in the public sector "were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," Pet. App. 22 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)), and that Congress also could have determined that the use of age in public sector employment often "violated the Constitution because such classifications are arbitrary and discriminatory." *Id.* at 23. The court of appeals noted that the statutory scheme enacted by Congress in the ADEA was carefully tailored to ferret

out and remedy such instances of arbitrary discrimination by requiring employers generally to make employment decisions based on the actual qualifications of an employee, rather than simply on the employee's age. *Id.* at 23-24.

## ARGUMENT

The court of appeals correctly ruled that the language of the ADEA clearly expresses Congress's intent to abrogate the States' Eleventh Amendment immunity. The court of appeals also properly concluded that the ADEA's abrogation falls within the "wide latitude" (*City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)) accorded Congress when it exercises its "comprehensive remedial power" under Section 5 of the Fourteenth Amendment (*City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (emphasis and quotation marks omitted)).

We, however, agree with petitioner (Pet. 9-10) that the courts of appeals are divided on those questions. In fact, the conflict has grown since the filing of the petition. On December 23, 1998, the Second Circuit joined the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits (and disagreed with the Eighth and Eleventh Circuits) in holding both that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the text of the ADEA and that Section 5 of the Fourteenth Amendment supports Congress's extension of the ADEA to the States and abrogation of their immunity. *Cooper* v. *New York State Office of Mental Health*, No. 97-9433, 1998 WL 898290, at *6 (2d Cir.).

Recognizing that the conflict is widespread and well-entrenched, the United States has already filed a petition for a writ of certiorari in *United States* v. *Florida*

*Board of Regents*, No. 98-796, raising the same questions presented in this petition.[2] Private plaintiffs in that case have also petitioned for a writ of certiorari in *Kimel* v. *Florida Board of Regents*, No. 98-791. For the reasons stated in our petition and reply brief in No. 98-796, we believe that those cases present the appropriate vehicle to resolve the split in the circuits. The *Florida Board of Regents* cases also provide a better context in which to decide the abrogation issues because those three consolidated cases present the Court with a broader range of factual contexts in which to evaluate the operation of the ADEA and its abrogation provisions.

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[2] We have furnished counsel for petitioners a copy of our petition and reply brief in No. 98-796.

## CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the petitions in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and, in the event one or both of those petitions is granted, the petition in this case should continue to be held pending this Court's decision. In the alternative, the petition should be denied.

Respectfully submitted.

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**On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit**

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# BRIEF FOR *AMICI* STATES OF OHIO, ALABAMA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, SOUTH CAROLINA, TEXAS, UTAH, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONER

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## STATEMENT OF *AMICI* INTEREST

*Amicus* State of Ohio and 23 other *amici* States join in supporting the petition for certiorari filed by the Board of Regents of the State of Tennessee. The questions in this case are whether Congress, in enacting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, intended to abrogate the States' Eleventh Amendment immunity from money-damages actions and, if so, whether it had the power to do so under section five of the Fourteenth Amendment.

The recent decision to grant certiorari in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531, *petition granted* January 8, 1999 (applicability of Patent Act claims against the States in federal court) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, No. 98-149, *petition granted* January 8, 1999 (applicability of unfair competition and false advertising claims under the Lanham Act against the States in federal court), demonstrates that the Court is aware of the importance of questions addressing the scope of Congress' authority to abrogate the States' Eleventh Amendment immunity. Furthermore, as confirmed by the recent filing of *amici* briefs on related subjects, the States have an immediate and vital interest in these issues. *See, e.g., State Bd. of Equalization of the State of California v. Southern Pacific Transportation Co.*, No. 98-584, *petition pending* (applicability of 4-R Act to claims against the States in federal court). The federal government also has an interest in these issues. It recently filed a petition for certiorari in *United States v. Florida Bd. of Regents*, No. 98-796, *petition pending*, a case concerning the applicability of claims filed against the States in federal court under the ADEA and the Americans with Disabilities Act.

Each of these types of claims generally, and each of the ADEA claims specifically, concerns the States for a number of reasons. The States face considerable costs in defending these cases, to say nothing of the potential damages and attorney fees in losing them. However, more than the potential expense explains the States' opposition to the Sixth Circuit's decision in this case and similar decisions by other courts of appeals. In holding that Congress may enact the ADEA under section five of the Fourteenth Amendment, the Sixth Circuit neglected the recent teachings of *City of Boerne v. Flores*, 521 U.S. 507 (1997), and sidestepped the requirements of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The first principles of a limited national government embodied in these decisions do far more than just protect the coffers of State governments. They ultimately further the transcendent goal of federalism – that individual liberty is most effectively secured by dividing the country into national and State governments, each with well-preserved and separate sovereign powers. In the interest of preventing the dilution of these critical principles, the *amici* States submit this brief for the Court's consideration.

## REASONS FOR GRANTING THE WRIT

### A. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE IS RECURRING AND THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH OTHER COURTS OF APPEALS.

As the petition asserts, there is a significant conflict of authority on both issues relevant to this case: (1) whether Congress has clearly expressed its intent to abrogate the States' immunity; and (2) whether Congress has the power to abrogate the States' immunity.

On the question of intent, the Eighth Circuit has held that the ADEA "does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity." *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (1998). Judge Edmondson of the Eleventh Circuit reached the same conclusion in *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1430 (11th Cir. 1998) (op. by Edmondson, J.) *petition pending*, No. 98-791. In contrast, several other courts of appeals, including the Sixth Circuit in this case, found that Congress clearly expressed its intent to abrogate in the text of the statute. *See Cooper v. New York State Office of Mental Health*, Nos. 97-9367, 97-9433, 97-9543, 1998 WL 898290, at *4 (2d Cir. Dec. 23, 1998); *Migneault v. Peck*, No. 97-2099, 1998 WL 74154, at *3 (10th Cir. Oct. 23, 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-66 (7th Cir. 1998).

A similar division of authority exists regarding Congress' power to abrogate State sovereign immunity under section five of the Fourteenth Amendment. The Eighth Circuit held that no such power exists, as the ADEA is not a valid exercise of Congress' section five authority. *Humenansky*, 152 F.3d at 826-28. And Judge Cox of the Eleventh Circuit agreed. *See Kimel*, 139 F.3d 1426, 1444 (Cox, J., concurring in part, dissenting in part). In contrast, the Second, Fifth, Seventh, Ninth and Tenth Circuits have all followed the Sixth Circuit's analysis in this case, holding that Congress possesses the requisite authority to make the ADEA applicable to the States in money-damages actions brought in federal court.

There plainly is a conflict of lower-court authority of sizable proportions on both issues, one that illustrates abundant consideration of the competing positions. Further

delaying review will not meaningfully improve the Court's consideration of the issue. Nor is there any way in which this conflict can be resolved save by a decision from this Court.

## B. THE WRIT SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S ANALYSIS DISREGARDS THIS COURT'S PRECEDENTS REGARDING THE CLEAR STATEMENT DOCTRINE AND CONGRESSIONAL POWER.

The ADEA does not contain a clear showing of congressional intent to abrogate the States' immunity, nor are the provisions of the ADEA a valid exercise of congressional power authorized by section five of the Fourteenth Amendment. The Sixth Circuit erred in its holdings on both issues.

The Sixth Circuit's analysis is incorrect as it fails to respect the teachings of either *Seminole Tribe* or *City of Boerne*. In *Seminole Tribe*, this Court ruled that Congress must clearly state its intention to abrogate the States' immunity. *Seminole Tribe*, 517 U.S. at 54. In *City of Boerne*, this Court stated that Congress' power to legislate under section five of the Fourteenth Amendment was limited to remedying violations of the Fourteenth Amendment. *City of Boerne*, 117 S.Ct. at 2163-64. In holding that the States' immunity had been abrogated by the ADEA, the Sixth Circuit failed to correctly apply the holdings of this Court.

### 1. The ADEA Does Not Contain Language Clearly Expressing Congress' Intent To Abrogate State Immunity.

State immunity may be abrogated only when Congress "mak[es] its intent[] unmistakably clear in the language of the

statue." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (Education for the Handicapped Act did not abrogate States' Eleventh Amendment immunity, because the intention of Congress to abrogate was not "unmistakably clear in the language" of the statute). The Sixth Circuit found that the 1974 amendments to the ADEA which expanded the definitions of "employer" and "employee" to include States and state employees demonstrated Congress' unmistakably clear intent. *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 301 (6th Cir. 1998).

The expansion of the ADEA to include claims against the States creates an inference that Congress intended the ADEA to be enforceable against the States in federal court. Contrary to the reasoning of the Sixth Circuit, however, language sufficient to create an inference is insufficient to abrogate State sovereign immunity under the Eleventh Amendment. *Dellmuth*, 491 U.S. at 232. The Court has previously rejected the lower court's reasoning, and held that amendment of the definitions of "employee" and "employer" to include the state workers and States is insufficient to abrogate the States' sovereign immunity. In *Employees of the Dep't of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973), the Court ruled that the amendment of the Fair Labor Standards Act, 29 U.S.C § 201 *et. seq.*, to include state workers without changing the enforcement provisions of the statute to extend liability to the States, was insufficient to abrogate the States' immunity. *Id.* at 285.

Although the ADEA's definitions of "employee" and "employer" were expanded by the 1974 amendments, Congress failed to amend the enforcement provision of the ADEA to extend liability to the States. Therefore, under this Court's holdings in *Employees of the Dep't. of Public Health*, *Dellmuth*, and *Seminole Tribe*, the ADEA does not contain a

sufficiently clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity.

## 2. The Sixth Circuit's Decision Disregards the Court's Holding In *City of Boerne*.

In construing section five of the Fourteenth Amendment, the Supreme Court has *never* held that the provision authorizes Congress to establish new rights not otherwise created by the Fourteenth Amendment. Indeed, since the days of Reconstruction, Congress' section five authority has been limited to outlawing state laws or practices that violate Fourteenth Amendment rights – as that Amendment has been construed by the federal courts. As the Court held in the *Civil Rights Cases,* 109 U.S. 3 (1883):

> [T]he last section of the Amendment invests Congress with power to enforce it by appropriate legislation. *To enforce what? To enforce the prohibition.* To adopt appropriate legislation for correcting the effects of prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action, of the kind referred to.

*Id.* at 11 (emphasis added).

Section five legislation thus has to "be adapted to the mischief and wrong which the Amendment was intended to provide against." *Id.*, at 13. It "cannot properly cover the

whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be ... to make Congress take the place of the State Legislatures and to supersede them." *Id. See also, Ex parte Virginia,* 100 U.S. 339, 348 (1880) (while section five "gives authority for congressional interference and compulsion in the cases embraced with the Fourteenth Amendment," it "is but a limited authority" that "extend[s] only to a single class of cases"); *Strauder v. West Virginia,* 100 U.S. 303, 309 (1880) (the point of section five was not to authorize Congress to place its own gloss on the amendment but to address the problem that "prejudice" in the States could make the guarantees a dead letter).

Nor do the voting rights cases depart from this view. In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Court upheld Congress' suspension of literacy tests under section five because such tests historically had been used to disenfranchise blacks. *See also, City of Rome United States,* 446 U.S. 156 (1980) (refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes").

Most recently, in *City of Boerne v. Flores,* 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), the Court reaffirmed the proper scope of section five legislation by holding that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, was not a valid exercise of Congress' "remedial" power. RFRA's proponents claimed that section five authorized Congress "to provide statutory protection for a constitutional *value* when the Supreme Court had been unwilling to assert its authority." H.R. Rep. No. 88, 103rd Cong., 1st Sess., at 9 (1993) (emphasis added). In

rejecting that view, the Court held that section five authorizes Congress only to "enforce" the Fourteenth Amendment, *i.e.*, to "remedy" *actual violations* of the Fourteenth Amendment – not to decree or redefine the substance of the Fourteenth Amendment's restrictions on the states.

Old and new dictionaries confirm that the verb "enforce" in section 5 is a confining one. It merely empowers Congress to compel "obedience" to something – here, to require the States to adhere to the prohibitions contained in the equal protection and due process clauses. *See,* Webster, *An American Dictionary of the English Language* (1869) ("1. To put force upon; to force; to constrain; to compel; as to *enforce* obedience to commands."); *A Dictionary of Law* (1893) 466 ("To constrain, or compel; to give effect to: as, to enforce an order of court."); *Dictionary of Words and Phrases* (1899) 322 ("To cause to have force and effect. To compel obedience to."); *The Oxford English Dictionary* (1933) Vol. III, 171 ("To compel the observance of (a law); to support by force (a claim, demand, obligation)."); *Webster's New International Dictionary* (1939) 847 ("To force; constrain; compel; as, to *enforce* obedience.").

As the Court stated in *City of Boerne*:

> Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach, supra*, at 326. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause

> cannot be said to be enforcing the Clause. *Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.* Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

*City of Boerne*, 117 S. Ct. at 2163-64 (emphasis added). Moreover, the Court observed that when Congress exercises its section five powers "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.*, 117 S. Ct. at 2164.

Finally, the Court compared RFRA to other proper exercises of Congress' section five enforcement authority:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

*Id.*, 117 S. Ct. at 2169-70.

Measured against these standards, Congress did not have authority to create private money damages actions under

ADEA that are enforceable against States in federal court. As an initial matter, no tenable claim exists that the ADEA *enforces* existing constitutional protections. Legislative classification based on age is neither suspect nor quasi-suspect and therefore is subject only to "rational basis" scrutiny under the Equal Protection Clause. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976); *Vance v. Bradley,* 440 U.S. 93 (1979). The ADEA, similar to RFRA, simply holds employment decisions in which age is a factor to a higher standard than provided for under equal protection jurisprudence – one essentially indistinguishable from the scrutiny applicable to decisions based on ethnicity or gender. By subjecting age-based classifications to a strict scrutiny standard, the ADEA attempts to make a substantive change in the constitutional rights of those individuals protected by the ADEA by creating a new "suspect classification." That this sort of restructuring of constitutional rights is beyond Congress' power has been recognized by the Court since *Marbury v. Madison*, 5 U.S. 137 (1803).

As the Court stated in *City of Boerne*:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts . . . alterable when the legislature shall please to alter it." Under this approach it is difficult to conceive of a principle that would limit congressional power.

*City of Boerne*, 117 S.Ct. at 2168, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (internal citations omitted).

The ADEA, like RFRA, does not remedy prior discrimination by state government. Congress articulated the following reason for extending the ADEA to the States:

> As the President said in his message of March 23, 1972, supporting such an extension of coverage under the ADEA, "Discrimination based on age – what some people call 'age-ism' – can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [*sic*] the contribution they could make if they were working."

H.R. Rept. No. 93-913, 93rd Cong., 2d Sess., *reprinted at U.S. Code Cong. & Admin. News* (1974), 2811, 2849. This statement explains why Congress found the ADEA's extension to the States to be desirable as a matter of social policy, but hardly constitutes evidence that prior state-sponsored discrimination towards older employees had violated the Equal Protection Clause.

Indeed, the legislative history fails to indicate any consideration by Congress of whether *States* had a history of violating the Equal Protection Clause in their treatment of older employees. In introducing the unsuccessful effort to extend the ADEA to the States in 1972, for example, Senator Bensten remarked only that "there is very disturbing evidence to suggest that the *Federal Government* . . . may be a leading

offender in applying pressure tactics to coerce older workers to retire at an early age." 118 Cong. Rec. 7745 (1972) (emphasis added). *See also*, Sen. Rept. No. 93-846, 93rd Cong., 2d Sess., at 112 (finding that in *federal* government employment, "older employee[s] had been singled out for reduction-in-force action; that the emphasis on early retirement placed an unequal burden on middle-aged workers; and in certain training programs youth is emphasized in determining eligibility").

Even if there were support in the legislative history for the argument that the ADEA's extension to the States was a response to discriminatory age limits set in the past, it was precisely such age limits which were held *not* to violate the Equal Protection Clause in *Murgia* and *Vance v. Bradley*. Thus, the ADEA cannot be regarded as an effort to "remedy" prior state violations of the Equal Protection Clause's rational basis test. Rather, it is merely an effort to afford state and local government employees rights *not* enjoyed under the rational basis test. Therefore, the ADEA is not valid section five legislation and may not abrogate the States' Eleventh Amendment Immunity.

Because the ADEA was not also validly enacted pursuant to section five of the Fourteenth Amendment, the Eleventh Amendment as interpreted in *Seminole Tribe* prevents its private enforcement against the State in damage actions brought in federal courts. It needs to be explained, however, that the ADEA still protects state and local government employees. This Court has already held that the ADEA is a valid enactment as applied to the States pursuant to the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226 (1983). The Eleventh Amendment does not protect the States from suit by the federal government, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), nor does it prevent private suits for injunctive relief, *Ex Parte Young*, 209 U.S.

123 (1908). Thus, although *City of Boerne* requires dismissal of the instant claim, it does not excuse public officials from compliance with the ADEA.

Finally, it must be remembered that the vision of federalism articulated here serves, not hinders, democracy. State sovereign immunity in federal courts, except in those cases necessary to enforce the overriding national commitments of the Civil War Amendments, protects democracy for the citizenry of each State. And the key point in this case is that public policy regarding employment of older Americans is not one of those fundamental national commitments contemplated after the Civil War, which necessarily overrides State sovereign immunity. For these reasons, the States should be immune from liability in federal court when the issue is whether or not a State, as employer, has improperly discriminated on the basis of age.

## CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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